IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

WLB, LTD,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case No. 01-46243-BJH-11**
	§	
WILLOWBROOK HOMEOWNERS ASSOCIATION,	§	**Adv. Pro. No. 02-4031**
	§	
Defendant – Counterclaimant;	§	
	§	
WILLOWBROOK HOMEOWNERS ASSOCIATION,	§	
	§	
Third Party Plaintiff.	§	
	§	
v.	§	
	§	
LUMACORP., INC., JIM MATTINGLY, and KATHY WHITMAN,	§	
	§	
Third Party Defendants.	§	

MEMORANDUM OPINION

Before the Court is the Motion for Partial Summary Judgment (the "Motion") filed by Plaintiff WLB, Ltd ("WLB") and Third Party Defendants LumaCorp., Inc. ("LumaCorp"), James Mattingly ("Mattingly"), and Kathy Whitman ("Whitman") (collectively, the "Movants"). Pursuant to Federal Rule of Civil Procedure 56(b), Movants seek to dispose summarily of all claims stated against them in the First Amended Counterclaim and Third Party Petition (the "Counterclaim and Third Party Petition") filed by Willowbrook Homeowners Association (the "Association"). Movants contend that there is either no evidence, or legally insufficient evidence, to establish at least one or

more of the elements in each cause of action asserted against them by the Association. The Association filed a response in opposition to the Motion (the "Response"), a brief in support of the Response (the "Association Brief"), and a supplemental brief in support of the Response (the "Association Supplemental Brief") but filed no affidavits in support of its opposition to the Motion.[1]

The Court heard the Motion on July 29 and September 18, 2002. The parties agree that this Court has "related to" jurisdiction over the Motion and the adversary proceeding in accordance with 28 U.S.C. §§ 1334 and 157. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law with respect to the Motion in accordance with Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

I. Procedural History

Plaintiff WLB originally brought suit in state court to compel the Association to issue a "Certificate of Resale."[2] The Association answered and filed a counterclaim against WLB and a third-party complaint against LumaCorp, Mattingly, and Whitman for breach of fiduciary duty, conspiracy, deceptive trade practices, and to recover punitive damages and its attorneys' fees. On August 31, 2001, the Association filed its voluntary petition under Chapter 11 of the United States Bankruptcy Code. On November 7, 2001, Movants removed the state court action to this Court and on March 21, 2002, Movants filed the Motion.

---

[1]When asked why the Association did not file any affidavits or other testimonial evidence in opposition to the Motion, counsel explained that the two disinterested members of the Board were no longer available to give such testimony. Apparently, one of such directors is not competent to give testimony and the other has had other difficulties with the Association and is no longer friendly to the Association.

[2]Under the Uniform Condominium Act, a condominium unit owner who intends to sell a unit must provide a resale certificate to the purchaser. The resale certificate must be issued by the association and must contain the current operating budget of the association as well as other information. *See* TEX. PROP. CODE ANN. § 82.157 (Vernon 1995). According to Movants, when WLB requested the resale certificate, the Association imposed a fine on the unit which caused WLB to be unable to sell the unit. WLB then filed a Verified Petition to enjoin the Association from issuing an improper fine and to require it to issue a proper resale certificate.

II. Burden of Proof

Because Movants seek summary judgment on the Association's claims and do not seek any affirmative relief by the Motion, the Association bears the ultimate burden of proof on each of its causes of action asserted in the Counterclaim and Third Party Petition. While Movants bear the initial burden of demonstrating the absence of material fact issues, "[t]o avoid summary judgment, the nonmovant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial." *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). The summary judgment movant:

> need not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial.

Epps v. NCNM Texas Nat'l Bank, 838 F. Supp. 296, 299 (N.D. Tex. 1993) (citing *Celtox Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "[U]nsubstantiated assertions are not competent summary judgment evidence." *Abbott,* 2 F.3d at 619. The nonmoving party must "'come forward with specific facts showing there is a genuine issue for trial' . . . [and] 'must do more than simply show some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

III. Analysis

The Willowbrook Condominiums (the "Condominiums") is a 60-unit condominium complex located in Arlington, Texas. In 1997, WLB purchased 39 units in the complex. At the time, Mattingly was a Vice President of Indian Partners V, Inc. (the general partner of WLB) and the President of LumaCorp. Whitman was an officer of Indian Partners V and a Vice President of

LumaCorp. After WLB purchased its units, Mattingly and Whitman were elected to the Board of Directors of the Association (the "Board").[3] After their election to the Board, LumaCorp was hired to manage the Condominiums.

Prior to WLB's purchase of its units, Jack Fowler ("Fowler"), Vice President of Construction at LumaCorp, inspected the Condominiums, made projections as to the needed repairs, and proposed a renovation budget for the Condominiums that estimated the total renovation cost to be $107,229.00. After LumaCorp was hired to manage the Condominiums, it engaged Sanco Design, Inc. ("Sanco") to do a project cost evaluation for potential drainage repairs. Sanco's initial analysis estimated the cost of drainage repairs and upgrades to be approximately $35,000.00 to $40,000.00. LumaCorp also requested that B & H Pools, Inc. ("B & H Pools") analyze potential pool repairs. Neither Whitman, Mattingly, nor LumaCorp held a position with or an ownership interest in Sanco or B & H Pools.

This dispute revolves around structural problems at the Condominiums and whether the Board, advised by LumaCorp and controlled by Mattingly, Whitman, and a third WLB representative, made appropriate decisions with regard to necessary repairs. Specifically, the Counterclaim and Third Party Petition state five counts, each of which is addressed below.

Count I: Breach of Fiduciary Duty as Directors Against Mattingly and Whitman

The Association is incorporated as a Texas non-profit corporation[4] and as such is governed by the Texas Non-Profit Corporation Act. *See* TEX. NON-PROFIT CORP. ACT art. 1396-1.01. Under this statute, directors must discharge their duties "in good faith, with ordinary care, and in a manner

[3]Although not named as a party to this lawsuit, a third WLB representative was also elected to the Board at this time.

[4]The Association is registered with the Texas Secretary of State as an active, non-profit Texas corporation.

the director reasonably believes to be in the best interest of the corporation." TEX. NON-PROFIT CORP. ACT art. 1396-2.28(A). "A person seeking to establish liability of a director must prove that the director has ***not acted***: (1) in good faith; (2) with ordinary care; and (3) in a manner the director reasonably believes to be in the best interest of the corporation." TEX. NON-PROFIT CORP. ACT art. 1396-2.28(D) (emphasis added). Thus, under the statute, the burden of proof is on the Association to prove that Mattingly and Whitman did not act in good faith, did not act with ordinary care, and did not act in a matter they reasonably believed to be in the best interest of the corporation. The Association has failed to raise a genuine issue of material fact with respect to each element of its breach of fiduciary duty claim.

For example, the Association alleges that Mattingly and Whitman breached their fiduciary duty when they "[r]ather than implementing a plan to repair and restore the common areas of the Condominium . . . entered into a common plan or scheme pursuant to which they agreed they would withhold from the other directors of the Association, its officers and members the need for substantial repairs to the common areas of the Condominiums . . ." Counterclaim ¶ 5. The evidence, however, shows that Mattingly made at least some disclosure of the need for repairs and improvements to the property, including disclosure of the drainage problem. Moreover, the minutes of the Board meetings indicate that the drainage problems were discussed at the meetings. *See* Brief in Support of Motion, Exhibit A (the "Mattingly Affidavit") ¶¶ 10, 12, 14, 16; Exhibit 4, p. 26, ¶ 5.e; Exhibit 6, pp. 36-38, ¶¶ II.A., III.B.; Exhibit 7, p. 39, ¶ II.A.; Exhibit 8, p. 41, ¶ III.B. The evidence also shows that Mattingly disclosed the April 28 budget with its estimated renovation budget of $92,086.00. *See* Mattingly Affidavit, p. 2, ¶ 10. Although there is no evidence that Mattingly disclosed the April 7 preliminary budget with its higher renovation estimate, there is also no

evidence that he withheld the need for substantial repairs from the other directors or the Board.

Next, the Association alleges that Mattingly and Whitman "either performed or entered into contracts to perform the repairs and the improvements with companies which were also owned or controlled by Mattingly and Whitman" and that the "work was done in a defective manner." Counterclaim ¶ 6. Regarding the contracts with Sanco and B & H Pools, the Association has no evidence to show that these companies had any other relationship with Movants. In fact, the evidence shows that there is no ownership or employment interest by any of the Movants in either Sanco or B & H Pools. *See* Mattingly Affidavit, p. 4, ¶ 17. Moreover, there is no evidence in the record to establish that the work was done defectively.

Regarding the contract with LumaCorp, the Association alleges that Mattingly and Whitman breached their fiduciary duty to the Association by not making the disclosures and obtaining the consent of disinterested directors or members required by the Texas Non-Profit Corporation Act "to validly employ LumaCorp as property manager." *See* Association Brief, p. 9, ¶ B.1.a. While the Texas Non-Profit Corporation Act ***does*** address contracts between corporations and interested directors in the context of whether those contracts are potentially void or voidable, the statute ***does not*** address void or voidable contract transactions as a basis for a breach of fiduciary duty claim. The Association has cited the Court to a recent Texas case to support its contention that Mattingly and Whitman breached their fiduciary duty by entering into an interested director transaction between the Association and LumaCorp. *See* Association Supplemental Brief, p. 4 (citing *Landon v. S. & H Marketing Group*, 82 S.W.3d 666 (Tex. App. – Eastland 2002, *reh'g denied*, no pet. h.)).

The Association contends that *Landon* shifts the burden of proof in a breach of fiduciary duty

claim by requiring the interested officer or director to show that the transaction is fair. The Court disagrees with this overly broad interpretation of *Landon*. While the *Landon* court notes that article 2.35-1(A) of the Texas Business Corporation Act[5] "appears . . . [to alter] common law with respect to the requirement that the director prove that the contract or transaction is fair to the corporation for every challenged transaction," 82 S.W.3d at 673, the court is simply referring to one of the alternative ways in which an interested director transaction can be validated – *i.e.*, the "burden of proof is on the interested officer or director to show that the action under consideration is fair to the corporation." *Id.* (citing *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963)). The *Landon* court is not addressing the burden of proof in a breach of fiduciary duty claim.

Moreover, on this record, the Court cannot find the management contract between the Association and LumaCorp void or voidable. Under article 1396-2.30(A) of the Texas Non-Profit Corporation Act, the contract between the Association and LumaCorp is not void or voidable merely because Mattingly and Whitman were interested directors if: (1) the material facts as to the relationship between Mattingly, Whitman, and LumaCorp were known to the Board and the Board in good faith and with ordinary care authorized the contract or transaction by the affirmative vote of a majority of the disinterested directors or members, even though the disinterested directors or members are less than a quorum; (2) the material facts as to the relationship between Mattingly, Whitman, and LumaCorp were known to those Association members entitled to vote on the contract or transaction, and the contract or transaction was specifically approved in good faith and with ordinary care by vote of the disinterested members; or (3) the contract or transaction was fair to the Association when it was authorized, approved, or ratified by the Board or the members of the

[5]Article 2.35-1(A) of the Texas Business Corporation Act is virtually identical to article 1396-2.30(A) of the Texas Non-Profit Corporation Act.

Association. This ***disjunctive*** statute makes it clear that only one of the three alternatives must be met to clear a transaction of its "interested director" taint. *See* TEX. NON-PROFIT CORP. ACT ANN. art. 1396-2.30(A); *see also Landon*, 82 S.W.3d at 678-79.

Here, the evidence establishes that the first statutory alternative is met. There is evidence that Mattingly disclosed his relationship as President and co-owner of LumaCorp and his ownership interest in the Condominiums. *See* Brief in Support of Motion, Appendix, Exhibit 4, p. 26, ¶ 5.c. The evidence also shows that Whitman's LumaCorp relationship was disclosed to the Board. *See id.* While the Association alleges non-disclosure, the evidence does not support that allegation. In fact, the Board minutes reveal that both Mattingly's and Whitman's LumaCorp connections were disclosed prior to each's election to the Board. Furthermore, the evidence shows that the Board unanimously voted to impose the assessment and impliedly hire LumaCorp as its management company. *See id.* at ¶5.c., g. The Association did not offer any evidence that the decision to hire LumaCorp was not a unanimous decision of the Board.

On this record, the Association has not met its burden to establish a genuine issue of material fact regarding its breach of fiduciary duty claims against Mattingly and Whitman.

Count II: Breach of Fiduciary Duty Under Agency Against LumaCorp

As the Association's Managing Agent,[6] LumaCorp was obliged to fulfill its duties "with reasonable care, diligence, good faith, and judgment." *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.–Texarkana 1994, writ denied). If it failed to do so, LumaCorp would be liable to the Association for the resulting damage. *Id.*

The Association alleges that LumaCorp breached this duty by spending the special

[6] *See* Association's Appendix, p. 6, ¶ 14.

assessment funds on "cosmetic" repairs rather than on substantive drainage improvements and that such expenditure was not in the best interests of the Association and did not reflect good faith or judgment. Although the word "cosmetic" is hand-written on the Willowbrook Townhomes Renovation Budget dated April 7, 1997, the Association offered no evidence to show who wrote that word on the budget or if the repairs so indicated were in fact cosmetic.

On the other hand, there is some evidence to show that LumaCorp acted with reasonable care, diligence, good faith, and judgment in its capacity as Managing Agent. LumaCorp did its own inspection of the Condominiums, engaged Sanco to analyze the drainage issues, and engaged B & H Pools to analyze the potential pool problems. The evidence shows that it was the Board who decided to do repairs at the Condominiums in phases and adopted a repair plan that would accomplish repairs in phases. *See* Brief in Support of Motion, Exhibit 7, p. 39; Exhibit 8, p. 41. Similarly, the evidence shows that the Board decided to implement phase one and then decided to delay the implementation of phase two and to use some of the assessment money instead on pool repairs. *See id.*; *see also* Mattingly Affidavit, p. 3, ¶ 15. The Association offered no evidence to support its contention that LumaCorp misadvised the Board or otherwise failed to fulfill its duties with reasonable care, diligence, good faith, and judgment.

Next, the Association alleges that although the last Sanco report estimated that the drainage repairs would cost $98,202.24,[7] due to the Movants' influence on the Board, only $28,000.00 was actually spent on drainage repairs. Thus, the Association maintains that it sustained damages of at least $70,000.00 – *i.e.*, the difference between the amount estimated and the amount spent for

[7]The Sanco analysis discussed at the April 29, 1997 special Board meeting estimated renovation costs at $92,086.00. A revised Sanco analysis discussed at the October 30, 1997 Board meeting estimated renovation costs at $98,202.24. *See* Mattingly Affidavit, p. 2, ¶ 8; p. 3, ¶¶ 11-12.

drainage repairs. However, as set forth above, the evidence shows that it was the Board who decided to adopt a phased repair plan to address the drainage issue and that the Association's money was spent according to that plan. There is no evidence that the Board's plan was flawed or that the Board's decision was not a unanimous one.

In short, the Association failed to establish a genuine issue of material fact that LumaCorp failed to fulfill its duties to the Association with reasonable care, diligence, good faith, and judgment. Thus, there is no evidence to support the Association's breach of fiduciary duty claims against LumaCorp.

Count III: Conspiracy

The Association alleges that Movants engaged in a plan or scheme that constituted "an unlawful conspiracy and that acts were performed in furtherance of said conspiracy." Counterclaim ¶ 59. "An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983). The essential elements of conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Id.*; *Leigh v. Danek Medical, Inc.*, 28 F.Supp.2d 401, 405 (N.D. Tex. 1998); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Texas law recognizes "that proof of a conspiracy may be, and usually must be made by circumstantial evidence, but vital facts may not be proved by unreasonable inferences from other facts and circumstances." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968) (citation omitted).

Here, there is evidence to support the first element of the Association's conspiracy claim.

The evidence shows that are two or more persons – *i.e.,* Mattingly, Whitman, and LumaCorp. The Association alleges that the "objects" to be accomplished were to: (1) enable WLB to flip its units in the Condominiums and make money, (2) enable LumaCorp to earn property and construction management fees, and (3) allow Mattingly and Whitman, as LumaCorp officers, to benefit from those gains. *See* Association Brief, p.10, ¶ 2.b.

Even viewing the Association's claims with respect to the second element of a conspiracy action in the most favorable light, there is no evidence in the summary judgment record to support the third, fourth, and/or fifth elements. Regarding the third element, a civil conspiracy requires "the 'specific intent' to agree 'to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.'" *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (quoting *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995)). Merely proving joint intent to engage in conduct resulting in injury is insufficient to establish a cause of action for civil conspiracy. Instead, for "a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement." *Triplex,* 900 S.W.2d at 719 (Tex. 1995). In response to the Motion, the Association offers only the conclusory statement in its brief that "Mattingly and Whitman and, through them, WLB and LumaCorp, agreed on the object to be accomplished." *See* Association Brief, p. 10, ¶ 2.c. However, the Association did not point the Court to any summary judgment evidence that raises a genuine issue of material fact in support of its conclusion.

Regarding the fourth element of a conspiracy claim, the two unlawful acts alleged by the Association are: (1) the breach of fiduciary duty by Mattingly, Whitman, and LumaCorp and (2) deceptive trade practices by all of the Movants. As discussed above, on this record, the Association

has failed to establish a genuine issue of fact for each element of its breach of fiduciary duty claims against Mattingly, Whitman, and/or LumaCorp. For the reasons explained below, the Association has failed to establish a genuine issue of fact for each element of its deceptive trade practices claims.

The fifth element of a conspiracy claim requires that the Association suffer damages as the proximate result of the Movants' actions. While the Association alleges that it suffered damages, it did not point the Court to any evidence to show: (1) how any damages suffered by the Association are the result of the Movants' conduct,[8] (2) the extent of those damages, or (3) that any money spent on repairs was wasted. *See* Association Brief, p. 9, ¶ B.1.b. (fn. 20) & ¶ B.2.e.

Again, the Association has failed to raise a genuine issue of material fact with respect to at least three elements of its conspiracy claims.

Punitive Damages Under Counts I, II, III.

Counts I, II, and III each allege that the actions were done "knowingly and with malice" and the Association seeks a recovery of punitive damages. *See* Counterclaim ¶¶ 10, 13, 17. Under Texas law, the Court may award punitive damages (other than in wrongful death cases) only if the claimant proves by clear and convincing evidence that the harm resulted from fraud or malice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997).

The Association did not specifically plead fraud. In the Response, however, the Association maintains that its "causes of action for breach of fiduciary duty and conspiracy are, in substance, fraud claims." *See* Association Brief, pp. 10-11, ¶ B.3. The Court disagrees. The elements of fraud

[8]It is clear that there were and still are structural problems at the Condominiums. However, it is also clear that these problems predate Movants' involvement at the Condominiums. Under the governing documents of the Association, the only way these structural problems can be addressed is through special assessments of the members of the Association. So, if too little money was initially assessed to fully repair these problems, or if some portion of the money was spent, in hindsight, on less significant (but nonetheless existing) problems, the solution available then is still available now – *i.e.*, make further assessments of the members for the money necessary to perform the further repairs that need to be done.

differ from the elements of breach of fiduciary duty and conspiracy. To prevail on a fraud claim, the Association must prove: (1) that the defendant made a material misrepresentation; (2) that the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of the truth; (3) that the defendant intended the Association to act on the representation; and (4) that the Association actually and justifiably relied on the representation. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001). The Association has not pled or offered any evidence to support a fraud claim.

In contrast, the Association did plead malice. Malice is defined as:

> (A) a specific intent by the defendant to cause substantial injury to the claimant; or
> (B) an act or omission:
> (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7) (Vernon 1997). However, there is no evidence that Mattingly, Whitman, or LumaCorp had a specific intent to cause substantial injury to the Association. There is also no evidence that Mattingly, Whitman, or LumaCorp committed an act or omission that meets the test set forth above.

Thus, the Association's punitive damages claims fail for either of two reasons: (1) the underlying claims fail, or (2) the Association failed to establish a genuine issue of material fact regarding its claim that Movants acted with the intent necessary to sustain its claims for punitive damages.

Count IV: Deceptive Trade Practices Against WLB, LumaCorp, Mattingly and Whitman

Movants contend that there is no evidence to support the Texas Deceptive Trade Practices Act claims against them. The Association did not address this part of the Motion in the Response or its briefs; and thus, did not direct the Court to any evidence to support these claims.[9]

After the Court's independent review of the summary judgment evidence, the Court concludes that the Association failed to carry its burden of proof in response to the Motion regarding its Texas Deceptive Trade Practices Act claims.

Count V: Attorneys' Fees

The Association has not demonstrated its legal right to recover attorneys' fees under any common law or statutory authority. Thus, summary judgment in favor of Movants on this count is also proper.

IV. Conclusion

Because the Association failed to file any affidavits in support of its claims, the summary judgment record was comprised of evidence largely prepared and submitted by Movants. On this record, the Court must conclude that there is an absence of evidence to establish a genuine issue of material fact in support of each element of the claims asserted by the Association against Movants. Thus, the Motion must be granted.

[9]When asked about these claims at the hearing on the Motion, counsel for the Association stated that he was not the Association's initial lawyer and that he agreed there was no basis for the deceptive trade practices act claims asserted here.

An Order consistent with this Memorandum Opinion will be entered separately.

Signed: October 8, 2002.

_____

Barbara J. Houser
United States Bankruptcy Judge